UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re:	
Agent Orange Product Liability Litigation	MDL 381
THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN, et al.,	
Plaintiffs,	
v.	04 CV 400 (JBW)
DOW CHEMICAL COMPANY, et al.,	
Defendants.	

STATEMENT OF INTEREST OF THE UNITED STATES

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Pursuant to 28 U.S.C. § 517,[1] and this Court's Order of August 9, 2004, the United States respectfully submits this Statement of Interest to attend to its interests in connection with this action.[2]

PRELIMINARY STATEMENT

Nearly thirty years after the withdrawal of the last American soldier from Vietnam, some twenty-five years after the first domestic action related to the United States' use of Agent Orange and other herbicides in Vietnam, and twenty years after that first round of litigation was settled, plaintiffs seek to achieve via litigation what their Government has not achieved via diplomacy – compensation for the alleged harms caused by the use of chemical herbicides in Vietnam. In addition to asserting a variety of common law tort claims, plaintiffs assert that the defendant chemical companies conspired with the United States to commit war crimes, genocide, crimes against humanity, and torture. The implications of plaintiffs' claims are astounding, as they would (if accepted) open the courthouse doors of the American legal system to former foreign enemy nationals and soldiers claiming to have been harmed by the United States Armed Forces' use of materials supplied by American manufacturers during times of war. At bottom, this litigation seeks to challenge the means by which the United States prosecuted the Vietnam war, and ineluctably draws into issue the President's constitutional Commander

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[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[2] The United States agrees with this Court's well-reasoned opinion regarding the applicability of the government contractor defense to the state law claims in the Isaacson case, 304 F. Supp. 2d 404, 424-39 (2004), and sees no reason why the same analysis would not apply to the state law claims at issue in the instant litigation. It would be anomalous indeed if American veterans were precluded from bringing such state law claims, but aliens, including former soldiers in an enemy army, were permitted to assert such claims.

in Chief authorities and invites impermissible second-guessing of the Executive's war-making decisions.

Plaintiffs seek such a breathtaking expansion of federal jurisdiction based on actions that were, at the time, the subject of great debate with respect to their status under international law. Indeed, the Executive branch considered – and repeatedly rejected – the contention that the use of chemical herbicides in Vietnam constituted a violation of the laws of war. Based in part on this determination, President Kennedy himself authorized the use of herbicides, and the United States requisitioned the chemicals at issue from the defendant manufacturers. In light of this background, plaintiffs' international law claims should be dismissed for a variety of reasons.

First, adjudication of plaintiffs' international law claims would require this Court to pass upon the validity of the President's decisions regarding combat tactics and weaponry, made as Commander in Chief of the United States during a time of active combat. Such judicial review would impermissibly entrench upon the Executive's Commander in Chief authority, and run afoul of basic principles of separation of powers and the political question doctrine.

Second, plaintiffs lack a cause of action to assert the international law claims set forth in the Amended Complaint. None of the statutes or treaties relied upon by plaintiffs provide them with a cause of action. Moreover, the Amended Complaint fails to state a cognizable claim for a violation of the law of nations under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Supreme Court's recent decision in Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004). Because the use of herbicides in war was not unlawful – let alone universally and specifically proscribed – the Court should not recognize a federal common law cause of action seeking damages for such conduct.

Third, because the Executive branch considered the very questions of customary international

law now before the Court, expressly determined that the conduct at issue did not violate such law, and the President himself acted based upon that determination pursuant to his constitutional authority as Commander in Chief, the President's actions displace any contrary international legal norm as a rule of decision in this case. Because these controlling executive acts preempt the application of customary international law in the domestic legal system, the Court should reject any claims based upon such law.

Fourth, were the Court to address plaintiffs' international law claims, it should give deference to the Executive's interpretation of the relevant treaties and customary international law. The Executive branch has significant expertise in the formulation and interpretation of both treaties and customary international law, which this Court should accord the substantial deference it is traditionally afforded. That interpretation has consistently been that the United States' use of chemical herbicides in Vietnam did not violate any applicable rules of international law.

Finally, even if the Court were to determine that plaintiffs have stated a cognizable claim for a violation of international law, the government contractor defense should be held applicable to those claims. All of the rationales set forth by the Supreme Court for the adoption of the defense as a matter of federal common law apply to the case at bar, and international legal principles do not foreclose its application to claims allegedly founded upon customary international law.

For all of these reasons, the Court should dismiss plaintiffs' international law claims.

BACKGROUND[3]

I. The United States Consistently Has Taken the Position that No Rule of International Law Barred the Use of Chemical Herbicides in War Generally

The primary source of the alleged prohibition on the use of chemical herbicides in combat is the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("1925 Geneva Protocol" or "Protocol"), 26 U.S.T. 571. See, e.g., Am. Compl., ¶¶ 75-76; Transcript of Hearing March 18, 2004 ("03/18/04 Tr.") at 28. The Protocol, however, was not ratified by the United States until 1975, and thus was not binding upon the United States at the time of the Vietnam War.[4] Because the Protocol "is evidence of the customary law norm," John Norton Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis*, 58 Va. L. Rev. 419, 450 (1972), however, and because discussion of the issue most often revolved around interpretation of the Protocol, we focus on the disputed scope of the Protocol to demonstrate the absence of any customary international law norm prohibiting the use of chemical herbicides in combat.[5]

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[3] The United States addresses herein solely the United States' long-standing and consistent interpretation of international law as not barring the use of chemical herbicides in war.

[4] The Protocol was based upon the Hague Gas Declaration of 1899, the Versailles Treaty, and the 1922 Washington Treaty on Submarines and Noxious Gases. See George Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 Wisc. L. Rev. 375, 375-77. The United States never ratified the first two of these treaties, and the latter never entered into force. Id. Thus, until its ratification of the 1925 Geneva Protocol, the "United States [was] not a party to any treaty which expressly prohibit[ted] it from engaging in gas or bacteriological warfare." Id. at 381.

[5] The scope of any customary international law prohibition is not necessarily the same as the scope of the Protocol. See Moore, 58 Va. L. Rev. at 454; R.R. Baxter and Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 Am. J. Int'l L. 853, 855-56 (1970). While universal agreement that the Protocol prohibited the use of herbicides and defoliants would not

The Executive Branch has consistently taken the position that the Protocol does not apply to chemical herbicides, and that no other principle of international law prohibited their use in war. See generally Moore, 58 Va. L. Rev. at 444-47; Baxter & Buergenthal, 64 Am. J. Int'l L. at 864 & n. 59 ("The United States has consistently asserted that the use of these weapons did not violate the Protocol."). Thus, as early as 1961, when the use of chemical defoliants was first being considered by President Kennedy, Secretary of State Dean Rusk informed him that "[t]he use of defoliant does not violate any rule of international law concerning chemical warfare and is an accepted tactic of war." Memorandum from Secretary of State Rusk to President Kennedy, Nov. 24, 1961 ("Rusk Memorandum"), reprinted in I Foreign Relations of the United States 1961-1963, Vietnam, 1961, at 663, available at <http://www.state.gov/www/about_state/history/vol_i_1961/z.html> (Item 275).

The United States consistently took this position publicly as well. In 1966, the United States Ambassador to the United Nations, James M. Nabrit, Jr., stated to the General Assembly that the 1925 Geneva Protocol does not apply to herbicides. See Moore, 58 Va. L. Rev. at 444-45, citing United States Arms Control and Disarmament Agency ("ACDA"), 1966 Documents on Disarmament ("1966 Documents on Disarmament") at 800-01. See also 1966 Documents on Disarmament at 742-43 (statement to same effect by William C. Foster, ACDA). Indeed, in that same year, notwithstanding the United States' use of herbicides in Vietnam, but consistent with the United States' position that the Protocol does not prohibit such use, the United States co-sponsored and voted for a General Assembly

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necessarily establish an equivalent norm of customary international law binding on non-parties to the Protocol, see id. at 856, a determination that the Protocol itself was not universally understood to prohibit the conduct in question would significantly undermine any contention that a rule of customary international law reached such conduct.

resolution calling for "strict observance by all States of the principles and objectives of the Geneva Protocol." G.A. Res. 2162(B) (1966), reprinted in 1966 Documents on Disarmament 798-99, quoted in Moore, 58 Va. L. Rev. at 444.

On November 25, 1969 President Nixon announced that he would resubmit the Protocol to the Senate for ratification.[6] In making this announcement the President again reiterated the Administration's position that the Protocol did not apply to chemical herbicides. See 1969 House Hearings at 176-77, 181-83 (Statement of Mr. Pickering). This position was reiterated again when the Protocol was officially transmitted to the Senate for ratification on August 19, 1970. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare: Message from the President ("President's Message"), S. Exec. J, 91st Cong., 2d Sess., at vi. In the Letter of Submittal attached to the President's Message, Secretary of State Rogers expressly stated that "[i]t is the United States' understanding of the Protocol that it did not prohibit the use in war of . . . chemical herbicides." Id.

The Executive consistently reiterated this view throughout the Senate's consideration of the Protocol, and it was this very issue that delayed ratification for an additional five years. Thus, during hearings before the Senate Foreign Relations Committee in 1971, Administration officials repeatedly

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[6] The Protocol had previously been submitted to the Senate in 1926, but the Senate agreed to return the unratified Protocol to the Executive pursuant to the Executive's request in 1947. Chemical-Biological Warfare: U.S. Policies and International Effects: Hearings before the Subcomm. on National Security Policy and Scientific Developments, House Comm. on Foreign Affairs ("1969 House Hearings") at 180 (Statement of Thomas R. Pickering, Deputy Director, Bureau of Politico-Military Affairs, Department of State); Baxter & Buergenthal, 64 Am. J. Int'l L. at 855 n.11; 6 Unperfected Treaties of the United States of America, 1776-1976, at 473 (Christian L. Wiktor, ed. 1984).

asserted that the Protocol does not cover chemical herbicides. See The Geneva Protocol of 1925: Hearings Before the Senate Comm. on Foreign Relations, 92nd Cong. ("1971 Senate Hearings") at 5-7, 27, 30, 37-38 (Testimony of Secretary of State Rogers), 304-05 (Testimony of G. Warren Nutter, Department of Defense) (1972). Indeed, the Secretary of State indicated that President Nixon would likely reject ratification if the Senate conditioned its advice and consent on an interpretation of the Protocol that covered herbicides. Id. at 37-38.

In response to a request from Senator Fulbright during the course of the 1971 Senate Hearings, the General Counsel of the Department of Defense set forth the Department's view that neither "the rules of customary international law," the 1925 Geneva Protocol, nor the Hague Regulations governing land warfare prohibited the use of "anti-plant chemicals for defoliation or the destruction of crops," provided that the use against crops met certain other criteria, discussed below. Letter from J. Fred Buzhardt, General Counsel for the Department of Defense to J.W. Fulbright, Chairman, Senate Comm. on Foreign Relations ("Buzhardt Letter"), April 5, 1971, reprinted in 1971 Senate Hearings at 315-17, quoted in Moore, 58 Va. L. Rev. at 444-45.[7]

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[7] This legal opinion was in accord with an earlier opinion provided in 1945 by Major General Myron C. Cramer, The Judge Advocate General, War Department, who concluded that although "a customary rule of international law has developed by which poisonous gases and those causing unnecessary suffering are prohibited," the "scope of this prohibition is restricted" and "it does not constitute a complete ban on all gases and chemical substances." Memorandum from Myron C. Cramer, Judge Advocate General, for the Secretary of War, SPJGW 1945/164, March 1945 ("Cramer Opinion"), ¶¶ 2-3, reprinted at 10 I.L.M. 1304-05. Noting the distinction between the use of poisonous gases against human beings and "the use of chemical agents to destroy property, such as natural vegetation, crop cultivations, and the like," Major General Cramer concluded that "the use of chemical agents . . . to destroy cultivations or retard their growth, would not violate any rule of international law prohibiting poison gas." Id. ¶ 3.

The administration reiterated its position that the 1925 Geneva Protocol does not apply to herbicides during hearings before the House of Representatives in the spring of 1974. See U.S. Chemical Warfare Policy: Hearings Before the Subcomm. on National Security Policy and Scientific Developments, House Comm. on Foreign Affairs, 93rd Cong. ("1974 House Hearings") at 150 (Statement of Amos Jordan). Moreover, the testimony made clear that "the current interpretation [of the Protocol] was approved by the President" himself. Id. at 206 (Testimony of Len Sloss, Deputy Director, Politico-Military Affairs, Department of State).

Finally, in late 1974, President Ford announced that, "with a view to achieving Senate advice and consent to ratification" of the Protocol, he was prepared "in reaffirming the current U.S. understanding of the scope of the Protocol" as not covering herbicides, to renounce, as a matter of "national policy," the first use of herbicides in war, except for use in limited circumstances. See Prohibition of Chemical and Biological Weapons: Hearings Before the Senate Comm. on Foreign Relations, 93rd Cong. ("1974 Senate Hearings") at 12 (1974) (Statement of Fred C. Ickle, Director, ACDA). See also id. at 27. On December 16, 1974, the Senate unanimously voted its consent to ratification. 120 Cong. Rec. 40,067-68 (Dec. 16, 1974).[8] On January 22, 1975, President Ford signed the instrument of ratification of the Protocol, and it was deposited with France and entered into force with respect to the United States on April 10, 1975. See 26 U.S.T. 571 (1975). Two days earlier, on April 8, 1975, President Ford issued Executive Order 11850 renouncing, as a matter of

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[8] Prior to the vote, Senator Nelson stated that while the Foreign Relations Committee neither accepted nor rejected the Administration's legal interpretation of the Protocol, it did tie its recommendation of ratification to President Ford's renunciation of first use of herbicides. Id. at 40,031. See also 1974 Senate Hearings at 29 (ACDA Response to Questions for the Record).

national policy, the first use of herbicides in war, except in certain limited circumstances. See 40 Fed. Reg. 16,187 (April 8, 1975).[9]

II. The United States Consistently Has Taken the Position that No Rule of International Law Barred the Crop Destruction Operations Undertaken in Vietnam

Similarly, the United States had long interpreted 1907 Hague Convention Respecting the Laws and Customs of War on Land ("1907 Hague Convention" or "Convention"), 36 Stat. 2277 (1910),[10] and international law generally, as not prohibiting the destruction of crops intended for use by enemy forces, precisely the type of crop destruction operations undertaken in Vietnam.

A. The Executive Branch Consistently Has Taken the Position that No Rule of International Law Bars the Destruction of Crops Intended for Use By Enemy Forces

As noted above, in 1945 the Judge Advocate General of the War Department provided an opinion as to the legality, under international law, of "certain crop-destroying chemicals which can be sprayed by airplane against enemy cultivations." Cramer Opinion, ¶ 1. See supra note 7. The Cramer Opinion concluded that "the use of chemical agents . . . to destroy cultivations or retard their growth, would not violate any rule of international law prohibiting poison gas." Cramer Op., ¶ 3. The Opinion also addressed other possible international law prohibitions on the destruction of enemy crops, including

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[9] That action, taken as a matter of policy rather than legal obligation, has no effect on the existence or recognition of any international legal norm governing the use of herbicides in war. Flores v. Southern Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003) ("Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law.").

[10] The Convention provides, inter alia, that it is forbidden "(a) [t]o employ poison or poisoned weapons; . . . (e) [t]o employ arms, projectiles, or material calculated to cause unnecessary suffering; . . . [and] (g) to destroy the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Id., art. 23.

the 1907 Hague Convention:

> Nor does the prohibition against using "poison or poisoned weapons" in Article 23 a of the Regulations annexed to the Hague Convention (IV) of 1907 render the use of these chemicals illegal. Even if Article 23 a is held to apply to toxic chemical substances, it would not preclude the use of crop-destroying chemicals which produce no noxious effect upon enemy soldiers. . . . The proposed target of destruction, enemy crop cultivations, is a legitimate one, inasmuch as a belligerent is entitled to deprive the enemy of food and water, and to destroy his sources of supply whether in depots, in transit on land, or growing in his fields.

Id., ¶¶ 4-5 (internal citations omitted).

This same conclusion was reached by the General Counsel of the Department of Defense a quarter-century later:

> [N]either the Hague Regulations nor the rules of customary international law applicable to the conduct of war and to the weapons of war prohibit the use of antiplant chemicals for . . . destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause human beings to be poisoned by direct contact, and such use must not cause unnecessary destruction of enemy property. . . . [T]he use of chemical herbicides is not prohibited by article 23(a) or any other rule of international law. It involves an attack by unprohibited means against legitimate military objectives. But an attack *by any means* against crops intended solely for consumption by noncombatants not contributing to the enemy's war effort would be unlawful for such would not be an attack upon a legitimate military objective. Where it cannot be determined whether the crops were intended solely for consumption by the enemy's armed forces, crop destruction would be lawful if a reasonable inquiry indicated that the intended destruction is justified by military necessity under the principles of Hague Regulation Article 23(g), and that the devastation occasioned is not disproportionate to the military advantage gained.

Buzhardt Letter, reprinted at 1971 Senate Hearings at 315-17 (emphasis in original).

The Army Field Manual took the same position, stating that Article 23(a) "does not prohibit measures taken to . . . destroy, through chemical . . . agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)." Department of Army Field Manual,

FM 27-10, The Law of Land Warfare (July 1956), ¶ 37, reprinted in Buzhardt Letter. See also 1971 Senate Hearings at 315 (discussing Field Manual); 1969 House Hearings at 215 (same).[11]

B. The United States' Crop Destruction Operations in Vietnam Focused on Crops Intended for Enemy Forces

The United States' use of chemical herbicides in Vietnam carefully hewed to this longstanding interpretation of international law. The initial use of chemical herbicides in Vietnam was restricted to defoliation operations. Am. Compl., ¶ 54-55; William A. Buckingham, Jr., Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia 1961-1971 (Office of Air Force History 1982) ("Operation Ranch Hand") at 21, available at <http://www.airforcehistory.hq.af.mil/Publications/fulltext/operation_ranch_hand.pdf>. After those initial defoliation operations, in 1962 President Kennedy decided to allow restricted crop destruction to proceed. Id. at 78; Am. Compl., ¶ 55. The President's decision was accompanied by instructions that "the targets should be chosen so as to cause the least damage possible to non-Viet Cong farmers." Buckingham, Operation Ranch Hand at 79.

The crop destruction program was thus focused on "crops intended for the use of Vietcong or North Vietnamese forces" in Vietcong-held territory. 1969 House Hearings at 215 (Testimony of Mr.

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[11] With respect to the references to "noxious effects" and "harm[] to man" in the above-quoted materials, the Second Circuit has held that "the clear weight of the scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings." In Re "Agent Orange" Product Liability Litig., 818 F.2d 145, 149 (2d Cir. 1987). See also In Re "Agent Orange" Product Liability Litig. ("FTCA/*Feres* Opinion"), 818 F.2d 194, 201 (2d Cir. 1987) ("If anything is clear after reviewing an appellate record of over 16,000 pages, reading hundreds of pages of briefs, and listening to two full days of oral argument, it is that the weight of present scientific evidence does not establish that Agent Orange injured military personnel in Vietnam.").

Pickering). See also id. at 197 (crop destruction undertaken only after "very thorough review" and "very thorough conclusions" about crops before destruction operations) (Testimony of Mr. Pickering), 229 ("friendly crops" excluded from target areas and all crop destruction projects approved by Ambassador) (Statement of Adm. Lemos); Buckingham, Operation Ranch Hand at 83. Thus, in a message from the State Department regarding the use of herbicides in crop destruction, the following guideline was issued by Secretary of State Rusk:

> Crop Destruction: 1. All crop destruction operations must be approved in advance by Assistant Secretary FE [Far East] and DOD. Guidelines re Crop Destruction: a) crop destruction must be confined to remote areas known to be occupied by VC. It should not be carried on in areas where VC are intermingled with native inhabitants and latter cannot escape.

Deptel #1055 SECSTATE to AMEMBASSY Saigon, May 7, 1963, quoted in Buckingham, Operation Ranch Hand at 86.[12]

This same policy of focusing crop destruction on enemy crops continued throughout the war. As explained by Rear Admiral Lemos in 1969:

> [W]e are really talking about very isolated crops in areas of known Vietcong and North Vietnamese army units, and which are clearly a part of that complex and being used, or being grown by them, or by people forced by them to grow for them.

1969 House Hearings at 250 (Testimony of Adm. Lemos). See also id. at 251 ("crop destruction program is associated with enemy camp areas and not the villages and hamlets"). Thus, before crop destruction could be approved, there "ha[d] to be substantial evidence that the crops are being grown

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[12] Eventually, approval for crop destruction missions was delegated to the American Ambassador, subject to concurrence by senior South Vietnamese officials. Buckingham, Operation Ranch Hand at 103-04, 114. See also id. at 119 (crop destruction in Laos also subject to Ambassador's approval).

specifically for the use of Vietcong troops and North Vietnamese troops." Id. See also 1971 Senate Hearings at 315 (Testimony of Mr. Nutter). As a result, the crop destruction program was only a small part of the overall use of herbicides in Vietnam. 1969 House Hearings at 250.[13]

In early December 1970, the decision was made to completely phase out the crop destruction program. Buckingham, Operation Ranch Hand at 172; 1971 Senate Hearings at 3 ("immediate termination of all use of chemical herbicides in Vietnam for crop destruction purposes") (Statement of Secretary of State Rogers). On January 16, 1971, the Deputy Secretary of Defense ordered the immediate termination of all crop destruction operations by U.S. forces. Buckingham, Operation Ranch Hand at 175.

ARGUMENT

I. Plaintiffs' Claims Raise Non-Justiciable Political Questions

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986). The doctrine arises from the twin constitutional principles of separation of powers among the three coordinate branches of government and the inherent limits of judicial competence. See, e.g., Baker v. Carr, 369 U.S. 186, 210 (1962); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111-12 (1948).

> Prominent on the surface of any case held to involve a political question is found [(i)] a textually demonstrable constitutional commitment of the issue to a coordinate

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[13] See also Buckingham, Operation Ranch Hand at 113, 129, 152.

> political department; or [(ii)] a lack of judicially discoverable and manageable standards for resolving it; or [(iii)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(iv)] the impossibility of a Court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(v)] an unusual need for unquestioning adherence to a political decision already made; or [(vi)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. See also Nixon v. United States, 506 U.S. 224, 228 (1993). If any one of these factors is "inextricable" to the case, it indicates the existence of a political question. See Baker, 369 U.S. at 217.

Plaintiffs' claims here fall squarely within the parameters set forth in Baker. The gravamen of plaintiffs' claims seek to challenge decisions regarding weaponry and combat strategy and tactics that are constitutionally committed to the President as Commander in Chief. U.S. Const., art. II, § 2, cl. 1. Moreover, courts lack judicially manageable standards by which to review such decisions, which are at bottom policy determinations of a kind clearly for nonjudicial discretion. Finally, in light of the United States' long-standing position that the use of herbicides in the Vietnam War did not violate any rule of international law, adjudication of plaintiffs' claims would also run afoul of Baker's admonition with respect to the need for the United States to speak with one voice on matters such as this.

A. Decisions About Combat Tactics and Weaponry are Constitutionally Committed to the President as Commander in Chief

Adjudication of plaintiffs' claims would violate basic principles of separation of powers, as it would require this Court to pass judgment upon wartime decisions about combat tactics and weaponry made by the President himself in his constitutionally-designated capacity as Commander in Chief of the United States Armed Forces. Such judicial review of the President's military decisions made in the

course of an ongoing armed conflict is beyond both the authority and competence of an Article III Court.

The Constitution expressly provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const., art. II, § 2, cl. 1. Pursuant to this authority to act as the Commander in Chief of the Nation's Armed Forces, the President is constitutionally authorized to make those political and military decisions governing the conduct of the Armed Forces during times of war. That authority obviously extends to decisions relating to the type of weapons to be used and how they are to be used.

The Supreme Court noted long ago that, "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 50 U.S. 603, 615 (1850). It is the "Constitution itself [that] gives the Commander in Chief [the authority] to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." Ex Parte Quirin, 317 U.S. 1, 28 (1942).

As the Supreme Court recently reaffirmed:

> Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. Department of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004).

At bottom, plaintiffs' claims – although nominally directed at the chemical company defendants – challenge the President's decision to use chemical herbicides during the Vietnam War for purposes of defoliation and enemy crop destruction. Indeed, plaintiffs allege, and this Court and the Court of Appeals have previously found, that "[t]he ultimate policy decision to use Agent Orange was made by President Kennedy. He, of course, was Commander in Chief of the Armed Forces with 'decision-making responsibility in the area of military operations.'" FTCA/*Feres* Opinion, 818 F.2d at 198, quoting DaCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973); see also In Re "Agent Orange" Product Liability Litig., 603 F. Supp. 239, 244 (E.D.N.Y. 1985) ("the decision to use herbicides in Vietnam was made by President Kennedy and had . . . military objectives"); Am. Compl., ¶¶ 54-55.

Adjudication of plaintiffs' claims, therefore, would require the Court to pass judgment upon military decisions made by the President himself as Commander in Chief. Such judicial review would impermissibly encroach upon the President's constitutional authority and violate separation of powers principles. And it would do so in the context of claims brought by former foreign enemy nationals and soldiers, effectively opening the courthouse doors to the Nation's former enemies to challenge Presidential decisions made in the course of directing armed conflict. Because plaintiffs seek to directly challenge strategic and tactical military decisions made by the President as Commander in Chief during a time of war, and the Constitution is clear that such decisions are committed to the President, adjudication of plaintiffs' claims would encroach upon this constitutional authority and exceed this Court's Article III powers. Cf. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (dismissing damages claim as political question on the grounds that "conduct of [military] affairs

are constitutionally committed to the Executive Branch under the President as Commander-in-Chief"). Or, in the words of the Baker Court, in light of the "textually demonstrable constitutional commitment of the issue" of which weapons to use and how to use them "to a coordinate political department," viz., the President, plaintiffs' claims present nonjusticiable political questions.

B. The Other Factors Set Forth in Baker Also Support Dismissal

In addition, as the Second Circuit noted in holding that the government contractor defense barred the opt-out American plaintiffs' claims against the chemical companies, "[s]ubjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond [not only] its constitutional authority [but also its] institutional competence." In Re "Agent Orange" Product Liability Litig., 818 F.2d 187, 191 (2d Cir. 1987), citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973). See also FTCA/*Feres* Opinion, 818 F.2d at 198 ("Absent a substantial issue, the wisdom of the decisions made by the[] concurrent branches of the Government should not be subject to judicial review").

The decision to use chemical herbicides was made by President Kennedy upon a recommendation by Secretary of State Rusk that "successful plant-killing operations in Viet-Nam, carefully coordinated with and incidental to larger operations, can be of substantial assistance in the control and defeat of the Viet Cong." Rusk Memorandum. There can be little doubt that, as the then-Acting Assistant Secretary of Defense testified before Congress, the "use of . . . herbicides [in Vietnam] . . . had one purpose – to [s]ave the lives of Americans and those of our allies." 1974 House Hearings at 154 (Statement of Amos Jordan, Acting Assistant Secretary for International Security Affairs, Department of Defense). Thus, as the Second Circuit has recognized, "at issue is a decision of the

veterans' highest military superiors that was designed to help the veterans in fighting the armed conflict in which they were engaged." FTCA/*Feres* Opinion, 818 F.2d at 200.

Decisions regarding what weaponry to use, and how to use it, in order to save American soldiers' lives and achieve the Nation's military objectives are inherently discretionary, complex, and subject to military expertise. They involve a wide variety of politico-military considerations. In a word, such decisions are political, not legal, decisions, and Article III courts are ill-equipped to review them because the courts lack the information or expertise necessary to assess the propriety of using a particular type of weapon in a particular manner.

A resolution of plaintiffs' claims would require the Court to revisit the discretionary military decisions made by the President as Commander in Chief, and make its own independent determinations as to whether the decision to use Agent Orange in an attempt to save American military lives was justified by the risks involved. Whether couched as state law tort claims or international law claims, the underlying nature of plaintiffs' claims are the same – they allege that the President's decision to use chemical herbicides was improper. Yet that decision was indisputably taken during a time of active hostilities abroad and in the President's constitutional role as Commander in Chief, based on a wide variety of military, political, legal, and other factors. Because this Court lacks any meaningful standards by which to assess the wisdom, legality or propriety of these decisions, this case is nonjusticiable under Baker.

The broad strategic nature of the decision to use chemical herbicides, the fact that the decision was made by the President himself, and the fact that the ongoing use of such herbicides was closely monitored, discussed and authorized at the highest levels of the Executive Branch render plaintiffs'

claims particularly unsuitable for judicial review (and serve to distinguish these claims from run-of-the-mill tort claims based upon the conduct of individual lower level military personnel or federal employees). For "[t]he greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination, which, in and of itself, is not subject to judicial second-guessing." In Re "Agent Orange" Product Liability Litig., 818 F.2d 204, 206 (2d Cir. 1987). At issue here is a military decision of great breadth, with far-reaching effect on the conduct of an armed conflict in a foreign country, made by the President himself pursuant to his constitutional authority as Commander in Chief. This Court cannot review that decision without running afoul of the most basic principles of separation of powers. Or, put another way, it is "exclude[d] from judicial review" because it involves a "controvers[y] which revolve[s] around policy choices and value determinations," rather than the judicial application of legal principles. Japan Whaling Ass'n, 478 U.S. at 230.

Other courts have similarly held that tort claims brought against defense contractors raise political questions where the claims at issue would require judicial review and re-assessment of military decisions, even where those decisions were significantly less far-reaching and made at significantly lower levels of authority than the decision to use chemical herbicides in Vietnam. Thus, for example, in Bentzlin, the court dismissed claims by the families of military personnel alleging a manufacturing defect in a missile on political question grounds. In so holding, the court noted that

> Plaintiffs' claims necessarily require inquiry into military strategy and, more specifically, orders to A-10 pilots and ground troops. The Marines' deaths occurred during the war. The conduct of such affairs are constitutionally committed to the Executive Branch under the President as Commander-in-Chief. . . . The policy decisions made in war are clearly beyond the competence of the courts to review . . . .

833 F. Supp. at 1497. See also Nejad v. US, 724 F. Supp. 753 (C.D. Cal. 1989) (Iranian airline

passengers' action against United States and defense contractors for damages based on shooting of airliner constitute political questions); Zuckerbaum v. General Dynamics Corp., 755 F. Supp. 1134 (D. Conn. 1990) (dismissing claim by soldier's estate against manufacturer of anti-missile system because although claims do not "directly challenge foreign policy and military decisions of the United States government, it seems unavoidable that this case would touch on military decisions which are committed to the executive branch and for which the court lacks judicially manageable standards"), aff'd on other grnds., 935 F.2d 544 (2d Cir. 1991) (affirming on state secrets ground); Doe v. Israel, No. 02-1431 (JDB) (D.D.C. 2003) (unpublished) (holding tort claims against defense contractors nonjusticiable political questions because "the role of defense contractors in producing and selling arms to Israel is tightly intertwined with United States foreign policy . . .").[14]

The last three factors set forth in Baker similarly support dismissal. Over forty years ago, President Kennedy made the political/military decision to use chemical herbicides in Vietnam. This

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[14] But see Koohi v. US, 976 F.2d 1328 (9th Cir. 1992) (holding that claims against United States and defense contractors, arising from shooting of Iranian airliner, did not raise non-justiciable political question because only damages were sought); McKay v. United States, 703 F.2d 464 (10th Cir. 1983) (political question doctrine does not bar claims against United States and its contractors arising out of operation of nuclear weapons plant and alleged pollution/contamination of land because claims cognizable under Federal Tort Claims Act); cf. Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) (dicta) ("it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief") (footnote omitted); Laird v. Tatum, 408 U.S. 1, 15-16 (1972) (dicta) ("when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nations's history or in this Court's decided cases . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied"). None of these cases involved challenges to tactical and strategic military decisions made by the President himself.

Court should not re-examine that decision.

As discussed above, the Executive has consistently and persistently taken the position that the use of chemical herbicides in Vietnam did not violate international law. In light of the long-standing and consistent Executive interpretation of international law, this Court should not undertake an independent resolution of the issue. Indeed, it is difficult to conceive of a case better suited for the Supreme Court's admonition in Baker that courts should not undertake "independent resolution" of issues when doing so would "express[] lack of respect due coordinate branches of government," or of a case in which there is more of "an unusual need for unquestioning adherence to a political decision already made" or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

Here, as discussed above, the Executive Branch at its highest levels has made the determination that international law does not prevent the use of chemical herbicides in war, both as a general matter and with respect to the specific manner in which they were used in Vietnam. Moreover, in light of and in reliance on this determination, the President decided to use chemical herbicides in Vietnam to save American and allied lives. In addition, the United States repeatedly proclaimed both to the public and to foreign governments – at the United Nations and elsewhere – that it did not believe that the use of chemical herbicides in Vietnam violated international law. Against such a background of public, persistent and consistent Executive interpretation and action, any independent resolution of this issue by the Court would express lack of respect for the Executive and the President – to whom decisions regarding weaponry and combat strategy and tactics are constitutionally committed.

Moreover, the unique circumstances of this case present "an unusual need for unquestioning

adherence to a political decision already made" – to wit, the President's decision, made over forty years ago, to use chemical herbicides in Vietnam. That decision was grounded in the President's assessment of the factual and legal circumstances in existence at the time, and was the basis for a decade of American military actions in Vietnam. It was the subject of great public and Congressional debate. Ultimately, President Nixon made the decision to stop the use of chemical herbicides in Vietnam, and President Ford renounced the use of chemical herbicides as a matter of national policy (while expressly re-affirming the Executive's position as to the legality of such use). This Court should not now re-examine those political decisions. To do so would not only raise "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," Baker, 369 U.S. at 217, but would also re-open a political debate put to rest long ago. The principles of Baker therefore support a determination that plaintiffs' international law claims are nonjusticiable.

* * *

Whether viewed as the result of the constitutional commitment of the Commander in Chief power to the President, the absence of judicially manageable standards, or the need to adhere to long-standing and consistent Executive interpretation and action, it is clear that this Court is an inappropriate forum for plaintiffs' claims.[15] Plaintiffs' claims should be dismissed.

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[15] This is not to say that plaintiffs have no recourse for the harms they are alleged to have suffered. Traditionally, claims for war reparations – which is essentially what plaintiffs are seeking – have been handled on a government-to-government basis in the diplomatic arena. See infra Section II.B.6.b.

II. Plaintiffs' Lack a Cause of Action to Assert Their International Law Claims

A. The Statutes and International Materials Cited by Plaintiffs Do Not Provide for a Private Right of Action

Plaintiffs have asserted four claims for relief founded upon alleged violations of international law: war crimes, genocide, crimes against humanity, and torture. Am. Compl., ¶¶ 260-76 (First through Fourth Claims for Relief). They assert that these claims "arise from" a variety of sources, including international treaties, other international materials, and three federal statutes. Id., ¶ 251. None of the sources of law cited in paragraph 251 of plaintiffs' Amended Complaint, however, provides a private cause of action for plaintiffs' international law claims.

The federal statutes cited by plaintiffs do not provide for a private cause of action. See generally Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (private rights of action must be created by Congress, and Court's role is to determine Congressional intent). The War Crimes Act ("WCA"), 18 U.S.C. § 2441, is a criminal statute and does not provide a private civil remedy.[16] The Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, which expressly provides for civil liability in certain circumstances, is by its terms inapplicable to the case at bar.[17] And the ATS – which provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort

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[16] In passing the WCA, Congress indicated its intent to allow for the *criminal* prosecution of war crimes. Congress' silence with respect to any *civil* remedy strongly suggests that no such remedy should be recognized by the courts. See Sosa, 124 S. Ct. at 2763; Alexander, 532 U.S. at 286-87; Cent. Bank of Denver v. First Interstate Bank, 511 U.S. 164, 190 (1994); Cort v. Ash, 422 U.S. 66, 80 (1975).

[17] The TVPA is applicable only when (i) the defendant acts "under actual or apparent authority, or color of law, of any foreign nation," TVPA, § 2(a), and (ii) with respect to torture, where the individual being tortured is "in the offender's custody or physical control," id. § 3(b)(1). For both of these threshold reasons, the TVPA does not provide plaintiffs in this action with a cause of action.

only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350 – is a jurisdictional statute, which the Supreme Court has held does not establish a cause of action for alleged violations of international law. Sosa, 124 S. Ct. at 2754-55.

Nor do the various international legal materials cited by plaintiffs provide for a cause of action. It is well settled that international treaties do not provide private litigants with enforceable rights unless their terms are implemented by appropriate legislation or they are intended to be self-executing. See Head Money Cases, 112 U.S. 580, 598 (1884). See also Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a ("[i]nternational agreements, even those directly benefit[t]ing private persons, generally do not create private rights or provide for a private cause of action in domestic courts"); United States v. De La Pava, 268 F.3d 157, 164 (2d Cir. 2001) ("[T]here is a strong presumption against inferring individual rights from international treaties."); Columbia Marine Services, Inc. v. Reffet Ltd., 861 F.2d 18, 21 (2d Cir. 1988) ("An action arises under a treaty only when the treaty expressly or by implication provides for a private right of action. The treaty must be self- executing; i.e., it must "prescribe[ ] rules by which private rights may be determined."); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975). And none of the treaties cited by plaintiffs fall into these latter categories. See generally Memorandum of Law in Support of Defendants' Motion to Dismiss All Claims in Plaintiffs' Amended Class Action Complaint for Lack of Jurisdiction Over the Subject Matter and for Failure to State a Claim Upon Which Relief Can Be Granted at 28-30.[18]

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[18] Moreover, the United States was not a party to the 1925 Geneva Protocol during the relevant time period, meaning that the Protocol was not the "law of the land" at that time in any event.

Any claim predicated on international law, therefore, must be based upon federal common law, to the extent that federal common law incorporates customary international law. Sosa, 124 S. Ct. at 2754, 2761. As discussed below, such federal common law claims under the ATS fail as well.

B. Plaintiffs' Claims Fail to Meet the Demanding Standard for a Federal Common Law Claim Under the ATS

1. Sosa Set Forth an Exacting Standard That Must Be Met Before a Court Can Recognize a Federal Common Law Claim Under the ATS

As noted, Sosa held that the ATS is a jurisdictional statute that does not establish a cause of action. 124 S. Ct. at 2754-55. The Court also held, however, that the ATS permits federal courts in limited circumstances to recognize a federal common law cause of action brought by an alien alleging a violation of the law of nations. Id. at 2754, 2759. The Sosa Court cautioned that "the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789," id. at 2754, when the ATS was enacted, should not be taken as authority for the federal courts to rely upon unencumbered common law powers to recognize and remedy international law violations. To the contrary, the Court held that a necessary (but not in itself sufficient) requirement for such a federal common law cause of action under the ATS is that the claims "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms[, i.e.,violations of safe conducts, infringement of the rights of ambassadors, and piracy]." Id. at 2761.

Indeed, the Court went out of its way to chronicle reasons why a court must act very cautiously

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And General Assembly Resolution 2603-A – which is not a treaty – cannot give rise to a cause of action.

and with "a restrained conception of the discretion a federal court should exercise" in both recognizing common law claims under the ATS and in extending liability. Sosa, 124 S. Ct. at 2761-64, 2766 n.20. The Supreme Court thus instructed the federal courts to refrain from an "aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." Id. at 2762-63. The Court discussed at length the reasons for approaching this federal common law power with "great caution," id. at 2764: in general, courts must rely upon legislative guidance before exercising substantive law-making authority, and there is a heightened need for such guidance when the issues could impinge upon the "discretion of the Legislative and Executive Branches in managing foreign affairs." Id. at 2763.[19]

The Sosa Court thus held that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms" referenced above. Id. at 2765. It also held that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." Id. at 2767 (footnotes omitted).

The Sosa Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle must be both "accepted by the civilized world" and "defined with a specificity," and in both respects the norms must be

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[19] The Court noted that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences they should be undertaken, if at all, with great caution." Id.

"comparable to the features of the 18th-century paradigms" – i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy. Sosa, 124 S. Ct. at 2761. Thus, in resolving whether the necessary conditions are met, this Court should examine: 1) whether the prohibition on the conduct at issue was broadly, if not universally, accepted by the international community in a manner comparable to the "18th-century paradigms," and 2) whether the principle, as accepted by the international community, was defined with "specificity."

Plaintiffs' international law claims in the instant action are based upon the United States' use of chemical herbicides in prosecuting the Vietnam war for purposes of defoliation and destruction of enemy food crops, and upon the defendant chemical companies' role in providing the herbicides to the United States.[20] Because no widely accepted and specifically defined international law norm prohibited either the use of chemical herbicides in war or the destruction of enemy crops or otherwise prohibited the United States' use of chemical herbicides in Vietnam, plaintiffs' international law claims should be dismissed to the extent that they are based upon the conduct of the United States. Moreover, to the extent that plaintiffs' claims are based on a theory of aiding and abetting liability, they also fail for the additional reasons that the extension of civil aiding and abetting liability for international law violations is a legislative, and not a judicial, task.

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[20] Many of the activities about which plaintiffs complain were carried out by the Republic of Vietnam ("RVN"), as opposed to the United States. Because plaintiffs' Amended Complaint focuses on an alleged conspiracy between defendants and the United States, we focus herein on the United States' role in the use of herbicides, and do not differentiate between United States and RVN roles in the use of chemical herbicides. Nothing herein should be construed as an acceptance of responsibility or liability by the United States for any actions of the Republic of Vietnam.

2. No Universally Adopted Norm Prohibited the Use of Chemical Herbicides in War Generally

A review of the contemporaneous debate regarding the legality, under international law, of the United States' use of chemical herbicides in Vietnam makes clear that no widely accepted and specifically defined norm barred such use. Accordingly, pursuant to Sosa, no federal common law cause of action can be recognized based on such use. This is true regardless of how the Court might independently interpret the international treaties and materials at issue. That is, the question is not one of the Court's current interpretation as to whether international law prohibits such use of chemical herbicides, but rather whether a particular norm achieved widespread consensus and specific definition at the time of the conduct in question.[21] Because the prohibition against the use of herbicides in combat did not achieve such acceptance, plaintiffs' claims cannot be sustained.

That the United States refused to recognize any customary international legal norm prohibiting the use of chemical herbicides in war should effectively end the inquiry into whether such a norm was "accepted by the civilized world," Sosa, 1245 S. Ct. at 2761. As the above history makes clear, the United States consistently has taken the position that neither the Geneva Protocol nor any other rule of international law prohibited the use of chemical herbicides in war. And while certain Senators

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[21] The proper focus for the Sosa analysis relates to the state of international law at the time of the underlying conduct. See 03/18/04 Tr. at 28. See also Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law*, 30 Brit. Y.B. Int'l L. 1, 5 (1953) ("It can now be regarded as an established principle of international law that . . . the situation in question must be appraised . . . in the light of the rules of international law as they existed at the time, and not as they exist today. In other words, it is not permissible to import into the legal evaluation of a previously existing situation . . . doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law.").

disagreed with this position – either as a matter of policy or interpretation – it was (and is) the President's views that reflected (and continue to reflect) the official views of the United States. This consistent rejection by the United States of any rule of international law prohibiting the use of chemical herbicides in war by itself demonstrates that any norm of international law that might have existed at the time had "less . . . acceptance among civilized nations than the historical paradigms" discussed in Sosa, 124 S. Ct. at 2765. Cf. United States v. Yousef, 327 F.3d 56, 92 n.25 (2d Cir. 2003) ("it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States . . . could be deemed to qualify as a *bona fide* customary international law principle"); Flores, 343 F.3d at 164.[22]

Not only did the United States take a consistent position that the Protocol did not apply to chemical herbicides, but there was also no international consensus on this issue. In their Amended Complaint, plaintiffs allege that the use of herbicides "was considered by most of the international community to be a violation of international law and a war crime," and cite United Nations General Assembly Resolution 2603-A (1969) as support for this contention. Am. Compl., ¶ 75-76. Notably, Resolution 2603-A declared "as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Protocol], the use in international armed conflict of: (a) [a]ny chemical

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[22] This conclusion applies regardless of whether an international norm is deemed to have existed notwithstanding the United States' rejection of that norm. Cf. Bunn, 1969 Wisc. L. Rev. at 388-89. As Sosa emphasized repeatedly, the question for courts faced with novel claims under the ATS is not simply whether an international norm existed, but whether that norm was as widely accepted and well-defined as the three historical paradigms recognized in that case. 124 S. Ct. at 2761-62, 2765. For it is only the "narrow set of violations of the law of nations, admitting of a judicial remedy," id. at 2756, and not all violations of international law norms, that can be recognized as a matter of federal common law.

agents of warfare . . . which might be employed because of their direct toxic effects on man, animals, *or plants*." (emphasis added). G.A. Res. 2603A, 24 U.N. GAOR Supp. 30, at 16, U.N. Doc. A/7630 (1969). The resolution was thus directly targeted at the question of the applicability of the principles of the 1925 Geneva Protocol to chemical herbicides. The vote on the Resolution, however, demonstrates the lack of any international consensus with respect to the applicability of the Protocol to chemical herbicides.

As plaintiffs correctly note, the General Assembly adopted Resolution 2603-A by a vote of 80 to 3, with 36 abstentions. Am. Compl., ¶ 76; see Moore, 58 Va. L. Rev. at 445. As an initial matter, "since almost one third of the states that voted either voted against the resolution or abstained, the vote is perhaps another indication that the customary law concerning . . . herbicides [was] unclear." Id. at 451. See also 1971 Senate Hearings at 388; cf. Flores, 343 F.3d at 162-63 ("a treaty will only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles") (emphasis in original). Moreover, the identity of the states voting against the resolution or abstaining belies the contention that the vote demonstrates widespread acceptance of the norm among "civilized nations." Cf. id. at 163 ("The evidentiary weight to be afforded to a given treaty varies greatly depending on (i) how many, and which, States have ratified the treaty, and (ii) the degree to which those States actually implemented and abide by [its] principles"). The United States, Austria and Portugal voted against the Resolution. The abstaining states included "most of the NATO members and many major or significant military powers, such as . . . France, Great Britain, Italy, Japan, Belgium, Canada and Nationalist China," states "whose views would be particularly important in shaping a norm

of customary international law." Moore, 58 Va. L. Rev. at 451. See also id. at 463 ("Since less than half of the states [then] party to the Protocol expressed by their vote approval of a broad interpretation prohibiting . . . herbicides, and since more than one-third of the parties to the Protocol abstained, the resolution should not be deemed a conclusive interpretation of the Protocol."); Flores, 343 F.3d at 163; Baxter & Buergenthal, 64 Am. J. Int'l L. at 854 n.7; 1971 Senate Hearings at 5 (Statement of Secretary of State William P. Rogers); 1969 House Hearings at 182 (Statement of Mr. Pickering).[23]

In addition, a General Assembly Resolution – even one with greater support from the "civilized nations" of the international community – does not create any binding obligations under international law. As the Court of Appeals has noted, General Assembly resolutions:

> are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations. . . . General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue . . . .

Flores, 343 F.3d at 165. See also id. at 165-67.

Finally, even if the Court determined that a norm of international law prohibiting the use of chemical herbicides existed at the time in question, such a norm would not be binding upon the United States as a matter of international law.[24] It is a well-established principle of international law that a

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[23] States voting against the Resolution presumably did so for one or both of two reasons: (1) disagreement with the Resolution's interpretation of the Protocol; or (2) disagreement with using a General Assembly Resolution to purport to declare a rule of international law. See 1971 Senate Hearings at 5, 19-25; Moore, 58 Va. L. Rev. at 463 n.171.

[24] The primary source of the alleged prohibition on the use of chemical herbicides in combat – the 1925 Geneva Protocol – was not ratified by the United States (in part because of questions regarding its applicability to chemical herbicides) until 1975, and thus was not itself binding upon the United States at the time in question. Cf. Vienna Convention on the Law of Treaties, art. 28, 1980

dissenting state, which indicates dissent while a customary international law rule is in the process of development, is not bound by that rule. See Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992); Restatement (Third) Foreign Relations § 102, cmt. d; Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.B. Int'l L. 1, 2-3 (1985). Here, the United States' persistent and consistent public pronouncements that customary international law did not prohibit the use of chemical herbicides qualify it as a persistent objector under international law, and thus not bound by any rule that might have developed.

In light of the consistent position of the United States that the 1925 Geneva Protocol does not apply to the use of chemical herbicides and the lack of any international consensus that the Protocol did so apply, plaintiffs cannot demonstrate that the use of chemical herbicides by the United States violated a norm of such widespread acceptance by the international community as to approach the acceptance of the prohibitions against violations of safe conduct, infringement of the rights of ambassadors, and piracy in the late 18th century. Pursuant to Sosa, therefore, this Court should not recognize a federal common law cause of action based on the such conduct.

3. No Universally Adopted and Specifically Defined Norm Prohibited the Destruction of Enemy Crops

For similar reasons, to the extent that Plaintiffs' claims are based on the use of chemical

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U.N.T.S. 331 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."). Even those Senators who believed the United States should broadly interpret the Protocol to cover chemical herbicides recognized that the adoption of such an interpretation would not operate retroactively. See, e.g., 1974 Senate Hearings at 3 (1974) (Statement of Senator Humphrey) ("the adoption of a standard for the future would in no way reflect on our past practice with regard to chemical agents").

herbicides to destroy crops intended for use by enemy forces, they too fail to meet the exacting standards required by Sosa. For, as discussed above, the United States consistently has taken the position that neither the 1907 Hague Convention nor any other rule of international law prohibited the enemy crop destruction operations undertaken in Vietnam. Any norm of international law that may have existed with respect to crop destruction prohibited solely the destruction of crops intended for non-combatants. Particularly given the United States' longstanding position that neither conventional nor customary international law prohibited the use of herbicides to destroy enemy crops, no international norm prohibiting such practices was widely accepted by "civilized nations." For the same reasons discussed above with respect to the use of herbicides generally, therefore, no federal common law cause of action should be recognized based on the use of herbicides for crop destruction purposes.

4. The United States' Use of Chemical Herbicides in Vietnam Did Not Violate Any Other Specifically Defined Norm

To the extent that plaintiffs' claims are based not on the alleged *per se* illegality of the use of chemical herbicides in war, but rather on the specific manner in which the United States used such herbicides in Vietnam – i.e., to the extent that plaintiffs are alleging that the United States used a legal weapon in an illegal manner – their claims must also fail, because no specifically defined norm barred the United States' actions. In this regard, plaintiffs allege that the United States' use of chemical herbicides violated the laws of war by, inter alia, causing "the wanton destruction of cities, towns, villages, or the natural environment, or devastation not justified by military necessity." Am. Compl., ¶ 261. Presumably, plaintiffs are relying on the prohibitions in the 1907 Hague Convention against the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the

necessities of war." 1907 Hague Convention, art. 23(g). The United States recognizes that the principles of necessity and proportionality – i.e., the requirements that no other means exist to achieve the desired military advantage and that civilian damage not be disproportional to military advantage – have attained the status of customary international law.

Pursuant to Sosa, however, that is only the beginning of the inquiry. For there remains the question of whether the principles, as accepted by the international community, are defined with sufficient "specificity" comparable to the 18th Century paradigms noted in Sosa so as to allow for a cause of action under federal common law. In Sosa, the Court found that the claim of arbitrary detention had not achieved the status of a well-defined international law principle such that it could be enforced under the ATS. The Supreme Court explained that any consensus concerning this norm was "at a high level of generality." Sosa, 124 S. Ct. at 2768 n.27. The same is true here. There are simply no established international law standards of the specificity required by Sosa for establishing a federal common law cause of action for unnecessary or disproportionate use of military force.

Indeed, the very nature of the principles defy specificity, for they require the balancing of competing considerations and are inherently imprecise. That is, the rules do not proscribe any particular conduct that is readily identifiable. Rather, they require consideration by combatant commanders of a variety of factors – unique to the context of any particular military action – that affect decisions on what means may be available to achieve the military objective and whether the harms that particular military actions might cause would be disproportionate to the advantages attained. In light of the balancing nature of the principles, the very same act that might be deemed both necessary and proportionate in one circumstance, might be deemed unnecessary or disproportionate in another. It is

one thing, therefore, to recognize that these principles generally exist in customary international law. It is "harder," if not impossible, to "say which policies cross [the] line with the certainty afforded by Blackstone's three common law offenses" 124 S. Ct. at 2769.[25]

A recent report by a Committee established to review the NATO bombing campaign in Yugoslavia provides a good illustration of the imprecise nature of the rule of proportionality:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48, available at <http://www.un.org/icty/pressreal/nato061300.htm>. See also Declaration of Kenneth Howard Anderson, Jr., ¶ 67 ("The proportionality calculation is therefore inherently open-ended, imprecise and

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[25] Any inquiry by the Court in this area would require analysis of the rules of necessity and proportionality as they existed during the period in question. See supra note 21. While the international community has, in the conclusion and entry into force of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 U.N.T.S. (1979) 3-608 (No. 17512), developed more advanced rules on the protection of civilian objects, and some in the international community might assert that those rules have achieved the status of customary international law today, those more specific rules were neither drafted nor in force at the time in question.

subjective").

Because any consensus regarding the necessity and proportionality principles necessarily exists solely "at a high level of generality," id. at 2768 n.27, and because the principles are not "defined with . . . specificity," id. at 2761, and clearly have "less definite content" than the 18th Century offenses discussed in Sosa, id. at 2765, the Court should not recognize a federal common law cause of action for alleged violations of the necessity and proportionality principles. See also Flores, 343 F.3d at 160-61.[26]

5. Plaintiffs' Aiding and Abetting Claims Should Be Dismissed

The creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without a conclusion that Congress so intended, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area. The ATS speaks to a "civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An aiding and abetting claim is not brought against a party charged as having "committed" a tort in violation of the law of nations. Rather, allowing aiding and

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[26] As noted above, plaintiffs assert four separate international law claims for war crimes, torture, genocide, and crimes against humanity. Pursuant to Sosa, however, the proper focus of the Court is on the conduct in question and not on the legal claim alleged. While there is no doubt that "war crimes," "genocide," "crimes against humanity" and "torture" have achieved widespread acceptance as violations of international law, such a conclusion says nothing about whether the use of chemical herbicides in war was proscribed or whether the United States' use of such herbicides in Vietnam violated customary international law. In any event, the facts alleged in the Amended Complaint, and the historical record, make it abundantly clear that the United States' conduct in Vietnam did not constitute genocide, torture or crimes against humanity. As for war crimes – i.e., the violation of the laws and customs of war – the above discussion demonstrates that the use of chemical herbicides in Vietnam did not violate any laws of war.

abetting liability for ATS common law claims would extend liability not only to violators of international norms, but also against all those who allegedly gave aid and assistance to the tortfeasor. The ATS simply does not by its terms suggest such third-party liability.

Even where Congress expressly establishes domestic criminal aiding and abetting liability, the question whether to impose such liability for civil claims as well is still deemed a separate legislative policy that typically requires legislative action. As the Supreme Court explained in Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994), there is no "general presumption" that a federal statute should be read as extending aiding and abetting liability to the civil context. Id. at 182. In the criminal law context "aiding and abetting is an ancient . . . doctrine," but its extension to permit civil redress is not well established: "the doctrine has been at best uncertain in application." Id. at 181. While in the criminal context the government's prosecutorial judgment serves as a substantial check on the imposition of criminal aiding and abetting liability, there is no similar check on civil aiding and abetting liability claims. Cf. Sosa, 124 S. Ct. at 2763.

Significantly, the Central Bank of Denver Court noted that "Congress has not enacted a general civil aiding and abetting statute – either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." 511 U.S. at 182. The Court concluded, "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, *there is no general presumption that the plaintiff may also sue aiders and abettors*." Id. (emphasis added).[27] Thus, under Central Bank

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[27] This general presumption against implying aiding and abetting liability can be overcome in our domestic law. For example, the United States recently successfully argued in favor of aiding and

of Denver, a court must presume that there is no right to assert an aiding and abetting claim under the ATS.

Moreover, in Central Bank of Denver, the Court explained that adoption of aiding and abetting liability for civil claims would be "a vast expansion of federal law." 511 U.S. at 183. Such an expansion of the law, the Court held, required legislative action, and could not be carried out through the exercise of federal common law. Id. So, too, under the ATS. Reading this statute to permit aiding and abetting claims would vastly increase its scope and range. That vast increase should not be undertaken without clear guidance from Congress. Notably, the Supreme Court described the ATS as an "implicit sanction to entertain the handful of international law *cum* common law claims." Sosa, 124 S. Ct. at 2754 (emphasis added).

The Sosa Court cautioned that federal courts should be wary of "exercising innovative authority over substantive law" without "legislative guidance." Sosa, 124 S. Ct. at 2762. The Court also warned against assuming a legislative function in "crafting remedies" where resolution of the legal issue could adversely implicate foreign policy and foreign relations. Id. at 2763. The caution mandated by Sosa in deciding whether to recognize and enforce an international law norm under the ATS, when coupled with the teaching of Central Bank of Denver that the decision of whether to adopt aiding and abetting liability for a civil claim is typically a legislative policy judgment, lead to the unmistakable conclusion that aiding and abetting liability should not be recognized under the ATS, absent further congressional

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abetting liability under a statute providing a civil cause of action for those injured by an act of international terrorism, 18 U.S.C. § 2333. See Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002). That argument was based, however, on the particular context, language, and purposes of that statute.

action.[28] Ultimately, the questions of whether and, if so, how to expand the reach of civil liability under international law beyond the tortfeasor would present difficult policy and foreign relations considerations that should be determined by Congress, not the courts.

6. The Practical Consequences of Recognizing Causes of Actions in this Case Counsel Against Such Recognition

In addition to carefully cabining the Court's discretion to recognize new federal common law causes of action based on international law, Sosa also recognized that the "determination whether a norm is sufficiently definite to support a cause of action, should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." 124 S. Ct. at 2766. This is a paradigmatic case in which the "practical consequences" of recognizing a cause of action counsel strongly against such a result. As discussed above, plaintiffs' claims are based upon a challenge to the President's decision, as Commander in Chief, to use chemical herbicides to advance the war in Vietnam. The practical consequences of recognizing such a cause of action are extraordinarily problematic for several reasons.

a. United States-Vietnamese Relations

First, allowing plaintiffs' claims to proceed would interfere with the United States' ongoing bilateral relationship with Vietnam, particularly as it relates to the effect of chemical herbicides used in Vietnam. That relationship has been characterized by measured and specific agreement on various

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[28] The TVPA – which constitutes Congress' implementation, pursuant to the Convention Against Torture, of a civil remedy for violation of the international norm prohibiting torture – further supports this conclusion. Congress' decision not to provide for aiding and abetting liability in that context underscores the need to defer to legislative action before creating such liability.

issues relating to the war and its aftermath. Allowing claims such as plaintiffs' to proceed would serve to undermine and upset that relationship by usurping the authority to address issues relating to the use of chemical herbicides from the Executive Branch, where such authority properly resides.

The United States and Vietnam have entered into two agreements relevant to the matters here at issue. First, in 1995, the two countries entered into an Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims ("1995 Property Agreement"). See 34 I.L.M. 685 (1995). The 1995 Property Agreement settled claims of nationals of both parties relating to the taking or expropriation of property, and addressed the disposition of blocked Vietnamese assets in the United States. Id. Notably, the 1995 Property Agreement did not address claims for war reparations by either country.

Subsequently, in 2002, the United States, represented by the Department of Health and Human Services, entered into a Memorandum of Understanding with Vietnam, represented by the Vietnamese Ministry of Science, Technology and Environment. See Memorandum of Understanding ("MOU"), March 10, 2002, available at <http://usembassy.state.gov/vietnam/wwwh020310ii.html>. The MOU addresses future cooperation and collaboration between scientists in both countries with respect to research regarding the health and environmental effects of dioxin. Id. The MOU was the result of years of diplomatic negotiations with the Vietnamese regarding the use of chemical herbicides containing dioxin during the war. It reflects the full extent of the United States' willingness to engage with Vietnam on the question of chemical herbicides at this time.

Recognizing a cause of action for the international law *cum* federal common law claims asserted

by plaintiffs here would serve to undermine the Executive's conduct of the Nation's foreign relations with Vietnam. As demonstrated by both the 1995 Property Agreement and the MOU, to date, the United States has not agreed to provide reparations to the Vietnamese for the use of chemical herbicides during the war. Allowing plaintiffs' claims here to proceed would circumvent and defeat this Executive branch determination, and allow the plaintiffs to achieve via litigation that which their government failed to achieve via diplomacy. It is precisely such "potential implications for the foreign relations of the United States" that "should make courts particularly wary" of recognizing causes of actions such as plaintiffs', which have the effect of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Sosa, 124 S. Ct. at 2763. Where, as here, the precise subject matter at issue has been the subject of diplomatic negotiations, Sosa's cautionary notes are particularly applicable, and no federal common law cause of action should be recognized.

b. Reparation Claims Generally

A more general "practical consequence" also militates against recognizing a federal common law cause of action in the case at bar. Essentially, what plaintiffs seek is war reparations from the defendant chemical companies for the United States' conduct during the Vietnam war. They thus ask this Court to recognize a federal common law cause of action, by the United States' former enemies, against the United States' military contractors, for the United States' conduct during a war. The "practical consequences" of such a step are breathtaking, as it has the potential of opening federal courthouse doors to all of the Nation's past and future enemies. Such a step would likely have a chilling effect both on the President's exercise of his Commander in Chief powers, and on government contractors' willingness to provide the products necessary to ensure the defense of the Nation. See infra Section

V.B (discussing practical consequences of holding government contractor defense inapplicable to international law claims). Particularly in light of the traditional rule of international law that war reparations are the subject of government-to-government negotiations, and not individual claims, recognizing such federal common law claims would be truly extraordinary.

War reparations include "'all the loss and damage to which . . . Governments and their nationals have been subjected as a consequence of the war imposed upon them." Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 275 (D.N.J. 1999), quoting The Versaille Treaty, art. 231. See also Black's Law Dictionary at 1325 (8th ed. 2004) (defining reparations as "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation"). Claims based upon the United States' use of chemical herbicides as a tool of war readily fall within the scope of war reparations claims.[29]

Yet such war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations, as opposed to private lawsuits. "Under international law claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen." Burger-Fischer, 65 F. Supp.

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[29] It is the United States' longstanding position that under customary international law a State is not responsible for war damage claims or claims for death or personal injury caused by legitimate acts of war, such as those at issue here. See George T. Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in International Law of State Responsibility, Injuries to Aliens 243-58 (R. Lillich ed. 1983) (discussing the general principle that a state is not responsible for claims of war damage, personal injury, or death caused by legitimate acts of war); Charles C. Hyde, International Law Chiefly as Applied by the United States, at 955 (2d rev. ed. 1945) (same); Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, at 255-63 (1928) (same). The Court need not reach this issue, however, for the relevant point is that to the extent that such claims are deemed compensable, they are settled on a government-to-government basis.

at 273. Thus, "[l]ike other claims for violation of an international obligation, a state's claim for a violation that caused injury to rights or interests of private persons *is a claim of the state and is under the state's control*. . . . Any reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state." Restatement (3d) Foreign Relations § 902, comment i (emphasis added); cf. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003) ("[h]istorically, wartime claims against even nominally private entities have become issues in international diplomacy").

This latter point undermines any assertion that private claims for war reparations are as widely accepted as the eighteenth century paradigms discussed in Sosa. To the contrary, it establishes precisely the opposite – as a matter of international law war reparations claims such as plaintiffs' belong to states and not to individuals. To jettison this legal principle in order to recognize individual causes of actions for plaintiffs' claims would run counter to Sosa's admonition that the practical consequences of recognizing new causes of action "must" inform the Court's judgment in crafting federal common law. In sum, the determination of whether, when, and how to pay reparations for conduct of the United States' Armed Forces should stay where it has been for the past two-hundred-plus years by virtue of both the Constitution and principles of customary international law – with the Political Branches of government. For this reason as well, the Court should not recognize any federal common law cause of action in this case.[30]

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[30] Similarly, practical consequences counsel against recognizing a cause of action for the alleged illegal use of legal weapons (e.g., for violation of the necessity and proportionality principles). Recognizing such a cause of action would not only open the federal courts to all manner of suits by the Nation's enemies and former enemies, but also to aliens the world over claiming that military force (be it of the United States or of other countries) was used against them illegally. Allowing such lawsuits likely would cause foreign relations problems as the defendant militaries and their governments would protest

c. Aiding and Abetting Liability

Recognizing aiding and abetting liability under the ATS would also have additional "practical consequences" that counsel against recognition of such liability. First, in the domestic context, recognition of such liability in the circumstances of this case would undermine the principles supporting the government contractor defense. See infra Section V. That is, it would enable other plaintiffs to challenge the conduct of the United States government in circumstances in which Congress has not permitted such challenges and in which the general principles of sovereign immunity would otherwise apply. Second, adopting an aiding and abetting liability standard generally would likely trigger a wide range of ATS actions where plaintiffs seek to challenge the conduct of foreign nations – conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act. Aiding and abetting liability would afford plaintiffs the ability to, in effect, challenge the foreign government's conduct by asserting claims against those alleged to have aided and abetted the government, just as plaintiffs here seek to challenge the conduct of the United States by asserting claims against the defendants. The proliferation of such ATS suits in a variety of contexts would inevitably lead to greater diplomatic friction, an additional practical consequence counseling against recognition of aiding and abetting liability.

III. The President's Decision to Use Herbicides During the Vietnam War Constitutes a "Controlling Executive Act" Foreclosing Plaintiffs' Customary International Law Claims

Separate and apart from the absence of any cause of action to assert the international law

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to the United States.

claims in the Amended Complaint, those claims suffer from another fatal defect – that the President's actions displaced any customary international law norm as the rule of decision in this case. As the above discussion makes clear, the Executive Branch – speaking for the United States as a whole – consistently has taken the position that neither the Geneva Protocol, nor any other rule of international law, prohibits the use of chemical herbicides in war, and that neither the 1907 Hague Convention nor any other rule of international law prohibits the destruction of enemy crops during war. Moreover, the President, acting in light of this long-standing and consistent position, and in his capacity as Commander in Chief of the Armed Forces, made the decision to use chemical herbicides in Vietnam for both defoliation and enemy crop-destruction purposes. Under long-standing Supreme Court precedent, such decisive Presidential action displaces the application of customary international law as a rule of decision in federal courts, and thus dooms plaintiffs' claims based on such law.

The Supreme Court has long recognized, and recently reaffirmed, that customary international law is only incorporated into the law of the United States absent a "controlling executive or legislative act." The Paquete Habana, 175 U.S. 677, 700 (1900). See Sosa, 124 S. Ct. at 2765 (noting that Congress can "shut the door" to the law of nations "at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such"). See also The Schooner Exchange, 11 U.S. 116, 146 (1812). That is, the Supreme Court has recognized that in the United States customary international law is ultimately subordinate to municipal law, and, in the realm of foreign relations, both the Congress and the President himself can, when acting within their respective constitutional authority, displace the application of customary international law in the domestic legal system. At its simplest, the principle set

forth in The Paquete Habana stands for nothing more than the long-accepted proposition that customary international law cannot be part of federal common law if the federal political branches authorize conduct that varies from the international legal principle at issue. The Schooner Exchange, 11 U.S. at 146.

The cases applying The Paquete Habana's reference to "controlling executive act[s]" further reinforce this principle. In Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), the Eleventh Circuit held that a decision by the Attorney General to incarcerate the alien plaintiffs indefinitely, pending efforts to deport them, constituted a controlling executive act under The Paquete Habana regardless of any international legal principles barring indefinite detentions. 788 F.2d at 1454-55. In the words of the Garcia-Mir court, "the executive acts here evident constitute a sufficient basis for affirming the trial court's finding that international law does not control." Id. at 1455. Similarly, in Gisbert v. U.S. Att'y General, 988 F.2d 1437, 1447 (5th Cir. 1993), the Fifth Circuit held that the Attorney General's decision to detain the appellants indefinitely pending their deportation constituted a controlling executive action for similar purposes. Id. at 1447-48. That is, where a high-level Executive Branch official acts pursuant to constitutional authority, the international law principle at issue is deemed displaced and inapplicable domestically to prohibit the conduct in question.

This is particularly true where the "controlling executive act" is a decision made by the President in his capacity "both as Commander-in-Chief and as the Nation's organ for foreign affairs," Chicago & Southern Air Lines, 333 U.S. at 111. Indeed, even commentators skeptical of the scope of the exception for "controlling executive acts" recognize that acts by the President in his capacity as "'sole organ' in foreign affairs, and as commander-in-chief . . . may have an effect on the law of the United

States; they may make law and have the effect as law in the United States." Louis Henkin, Agora: May the President Violate Customary International Law?, 80 Am. J. Int'l L. 930, 934 (1986). See also id. at 935 ("the question is whether [the President] has constitutional authority to do the act that terminated the treaty or superseded the customary principle. The elimination of the treaty or of the principle of customary law from the law of the United States follows.").

As discussed above, the decision to use chemical herbicides in Vietnam for both defoliation and enemy crop destruction was made by the President himself, in his capacity as Commander in Chief of United States Armed Forces. Similarly, the United States' consistent interpretation of the 1925 Geneva Protocol as not applying to such herbicides was also approved by the President himself. The President's decision, therefore, should be deemed to constitute the very type of "controlling executive act" referenced in The Paquete Habana. Indeed, it is difficult to think of an executive act more appropriately considered to fall within the scope of this phrase. For here, the President himself made the decision at issue, in the course of commanding American combat forces, fully cognizant of the international legal issues. Accordingly, in light of the President's "controlling executive act," even if there were a customary international law norm prohibiting the use of chemical herbicides in war (a point emphatically disputed by the United States), such a norm would be displaced as a rule of decision for federal courts, and plaintiffs' customary international law claims cannot succeed.

IV. The Court Should Defer to the Executive's Determination That Neither the Treaties Cited by Plaintiffs Nor Customary International Law Prohibited the Use of Chemical Herbicides in Vietnam

An additional, but equally fundamental, reason that plaintiffs have failed to state a claim is that neither customary international law, nor the treaties that the plaintiffs claim reflect customary

international law, prohibited the use of chemical herbicides during the Vietnam War. As explained above, the President authorized the use of herbicides based on the State Department's reasoned legal opinion that such use did not violate international law. Even if the Court does not find Executive action controlling for domestic law purposes, the Executive's opinion in this matter should be given substantial deference.

It is well established that "the meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight." Kolovrat v. Oregon, 366 U.S. 187, 193 (1961). See Charlton v. Kelly, 229 U.S. 447, 468 (1913); see also United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982). In particular, when a treaty's terms are ambiguous, courts have afforded substantial deference to the Executive's interpretation of such treaties. United States v. Al-Hamdi, 356 F.3d 564, 570 (4th Cir. 2004) (giving "substantial deference to the State Department's interpretation of [the] treaty's provisions" because the State Department "is charged with responsibility for enforcing" the treaty) (internal citations and quotation marks omitted); United States v. Li, 206 F.3d 56, 63 (1st Cir. 2000) (when addressing ambiguous treaty terms, "[w]e first consult the United States Department of State's interpretation of the . . . treaties, to which we accord substantial deference"); Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) (granting "considerable deference" to State Department interpretation of treaty).

Similarly, "[c]ourts give 'particular weight' to Executive views on customary international law." Restatement (Third) of the Foreign Relations Law of the United States § 326, Reporters' Note 4 (1987). As the primary actor contributing to the development of customary international law for the

United States on the international plane, the Executive Branch has significant expertise as to the content of that law. Just as the foreign relations expertise of the Executive warrants deference to its treaty interpretations (as discussed above), the expertise of the Executive in developing and articulating U.S. positions with respect to customary international law also warrants deference when domestic courts are evaluating the scope of customary international law for domestic law purposes. In addition, deference is warranted because it is desirable, where possible, that the United States speak with one voice concerning its interpretation of international law. See Restatement (Third) of the Foreign Relations Law of the United States § 112, cmt. c (1987) ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters."). Cf. Baker, 369 U.S. at 217.

In this case, deference to the Executive Branch interpretation of both conventional and customary international law is particularly appropriate. None of the treaties at issue expressly prohibit the use of chemical herbicides during war. The ambiguity is demonstrated by the UN debate over the meaning of the most relevant treaty, the 1925 Geneva Protocol. That debate and the conflicting positions taken by the treaty's signatories only serve to illustrate a lack of consensus regarding the treaty's scope. Throughout the relevant time period, and well before this litigation arose, the Executive Branch maintained the consistent position that neither the Protocol nor any other source of international law prohibited the use of chemical herbicides in Vietnam. Thus, the Court should defer to the Executive's interpretation – of both treaties and customary international law – that international law did not prohibit the use of chemical herbicides in Vietnam. On the basis of such deference, the Court should dismiss plaintiffs' claims.

V. The Federal Common Law Government Contractor Defense Should Be Deemed Applicable to All of Plaintiffs' International Law Claims

A. The Reasoning of Boyle Applies With Even Greater Force to Plaintiffs' Claims

As discussed above, plaintiffs' international law claims, to the extent that they are recognized at all, are recognized as federal common law claims. See Sosa, 124 S. Ct. at 2754, 2765-66. As such, they should be subject to the federal common law government contractor defense. See Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Although principles of international law suggest that a "superior orders" defense is unavailable in certain circumstances in the context of international criminal law, the rationales that led the Supreme Court to adopt the government contractor defense as a matter of federal common law in the context of state-law tort claims apply with even greater force to federal common law claims for damages based upon international law.

As this Court has recognized, the Supreme Court has adopted "[t]he federal common law government contractor defense." In Re Agent Orange Product Liab. Litig. ("Agent Orange III Judgment"), 304 F. Supp. 2d 404, 432 (E.D.N.Y. 2004), citing Boyle. The defense applies when the United States approves reasonably precise specifications for equipment, the equipment provided by the contractor conforms to those specifications, and the supplier warns the Government about any dangers known to the supplier but not to the Government. Id. The Supreme Court based its adoption of the defense in Boyle on the principles underlying the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) (which, along with the exceptions for combatant activities and claims arising abroad, would bar suit against the United States based on the conduct here at issue):

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this

> provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.

Boyle, 487 U.S. at 511 (internal citation omitted).

Those "effect[s] sought to be avoided" are that "[t]he financial burden of judgments against contractors would ultimately be passed through, substantially, if not totally, to the United States itself . . ." Id. at 512. See also id. at 507. The Court thus concluded that "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." Id. at 512.

The very same reasoning applies to the case at bar. Allowing plaintiffs' international law claims to proceed against the defendants would result in the very harms that both the discretionary function exception and Boyle were intended to prevent. Indeed, the rationale for application of the defense to claims such as plaintiffs is even stronger than was the case in Boyle, which involved claims of defective design. Here, plaintiffs' claims are based upon – and necessarily call into question – not only the Government's decision to procure the products at issue, but also the military decisions regarding the precise nature of their use. Thus, rather than simply seeking to hold the defendants liable for their own alleged negligence in the manufacture of an allegedly defective product, the plaintiffs essentially seek to hold the defendants liable for the decisions made by the President regarding the manner in which to prosecute the war in Vietnam. Allowing such claims to proceed would have even further reaching

implications for military procurement than the claims at issue in Boyle, for it would expose defense contractors to potential liability for possibly unforseen uses of the goods ordered by the American Armed Forces. See, e.g., Agent Orange III Judgment, 304 F. Supp. 2d at 430 ("The method of use in Vietnam was classified"); 03/18/04 Tr. at 29-30 (recognizing implications of allowing such claims to proceed). Like the costs of liability for accidents caused by allegedly negligent manufacturing, the costs of such potentially broad and unknowable liability would be passed on to the United States. "It makes little sense to insulate the Government against financial liability" for the decision to use chemical herbicides in war, only to indirectly expose the Government to the costs of such decisions in the future by allowing suits such as this to proceed. Boyle, 487 U.S. at 512. The reasoning of Boyle clearly supports application of the government contractor defense to the international law claims at issue here.

Boyle was decided in the context of federal displacement of state law causes of action. Boyle, 487 U.S. at 507-08, 512.[31] Here, by contrast, the question is one of the applicability of a federal common law defense to a federal common law cause of action derived from international law norms. If anything, the argument for application of the government contractor defense is even more compelling in these circumstances, for the source of the defense is the same as the source of the cause of action – federal common law. Rather than displacing another source of law, the court would merely be applying

[31] The Court in Boyle recognized that it was possible to analyze the applicability of the government contractor defense in that case as "displacement of federal-law reference to state law for the rule of decision," as opposed to displacement of state law, in light of prior decisions recognizing that cases where "a uniquely federal interest exists [are] governed by federal law, with federal law 'borrow[ing],' or 'incorporat[ing]'or 'adopt[ing]' state law except where a significant conflict with federal policy exists." Id. at 507 n.3 (internal citations omitted). Similarly, federal law here has "borrowed," "incorporated" or "adopted" international law norms, and the question is whether such "borrowed" federal law should be displaced by other federal common law.

and reconciling two federal common law concepts. If the federal interest in a government contractor defense is sufficient to pre-empt and displace state law, it is certainly applicable where the cause of action is based on federal law.

B. Sosa Supports Application of the Government Contractor Defense to Claims Such as Plaintiffs'

Sosa further supports the conclusion that the government contractor defense should apply to federal common law claims based on international law norms. As noted above, Sosa cautioned that the "determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." 124 S. Ct. at 2766 (footnote omitted). See also id. at 2763. Although that admonition was directed at the process of determining whether a particular norm has attained a level of acceptance and definition so as to make it subject to a federal common law cause of action, the principle is equally applicable to the question of whether a federal common law defense should be recognized as applicable to such causes of action. In either case, the federal courts are engaging in judicial lawmaking, and it is the "practical consequences" of such lawmaking that the Supreme Court has admonished must be considered in the process. And the "practical consequences" here clearly support adoption of the government contractor defense.

First, Boyle itself was based on practical considerations, recognizing that allowing claims such as these to proceed against government contractors would result in an end-run around sovereign immunity and ultimately harm the public fisc. Sosa's reference to "practical consequences" is thus a clear invitation to apply the principles articulated in Boyle. Second, the practical consequences of

allowing claims such as plaintiffs' to proceed are even more profound than the consequences at issue in Boyle. Holding the government contractor defense inapplicable to claims such as plaintiffs', which essentially challenge military judgments made by the President, would effectively invite all of the United States' past and future enemies to sue a wide variety of military contractors based on such Presidential decisions in United States courts. See, e.g., 03/18/04 Tr. at 29-30. Such an invitation would result not only in increased costs to the United States, but would embroil the judiciary in the review and appraisal of military decisions reserved to the political branches. See infra § I. It also has the potential to impede the President's ability to carry out his duties as Commander in Chief, for every military decision – from the tactical to the strategic – would become the subject of potential litigation.

Moreover, reading Boyle and Sosa together strongly suggests that the government contractor defense should be deemed applicable in such circumstances. Boyle sets forth a clear rule of decision, based on principles derived from an Act of Congress, and contains no caveats or hesitations regarding the applicability of the defense there announced and applied. Sosa, by contrast, recognizes only an abstract principle, which was held inapplicable in that case, and is chock-full of references to the "caution" that must guide federal courts in this area, and the foreign policy and separation-of-powers concerns that mitigate against any broad reading of the decision. In light of the Supreme Court's clear holding in Boyle and its repeated expressions of caution in Sosa, the federal common law government contractor defense recognized in Boyle should be applicable to any federal common law causes of action derived from international law norms pursuant to Sosa.

C. International Legal Principles Do Not Foreclose Application of the Government Contractor Defense[32]

1. Federal Common Law Controls

Moreover, international legal principles are not inconsistent with the conclusion that the federal common law government contractor defense applies to claims based upon customary international law. As an initial matter, any such international legal principles are incorporated into U.S. law, if at all, as federal common law. And, as just discussed, federal common law has already been held to recognize the government contractor defense.

2. International Criminal Norms Are Inapplicable in the Civil Context

More importantly, as the Court has recognized, the Nuremberg and Eichmann cases – which would be the source of any alleged international law norm rendering the government contractor defense inapplicable in this case – involved criminal, as opposed to civil, liability. Id. at 22. This is an important distinction. Criminal law involves questions of individual moral culpability and punishment, while civil law is intended to be remedial. The defenses of necessity and obedience to superior orders – the closest criminal law analogues to the government contractor defense in the civil context – are intended to reflect and account for the principles of individual moral responsibility that underlie criminal law, prohibiting punishment where the individual actor is deemed not to have had a true moral choice with respect to his actions. See, e.g., International Law Commission, Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Principle IV. By contrast, the government contractor defense – as articulated by the Supreme Court in Boyle – is

[32] The United States addresses this issue in light of the comments made by the Court at the March 18, 2004, hearing in this case. See, e.g., 03/18/04 Tr. at 22-23, 25-27, 29.

intended, ultimately, to protect the government from liability for actions that Congress has not seen fit to include within the scope of any waiver of sovereign immunity.

Recognizing that the criminal law seeks to punish individuals for acts for which they are morally culpable, and that the necessity and superior orders defenses are intended to provide a defense to those individuals who were not, in fact, morally culpable, both the Nuremberg and Eichmann cases focused on the actions and intent of the individual defendants in determining whether the defense at issue applied. See, e.g., United States v. Krupp, IX Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 ("Trials of War Criminals") at 1439, 1448 ("we hold that guilt must be personal"). Thus, in both the Flick and Krupp cases, the tribunal focused on the specific conduct of the individual defendants, both to ascertain the role they played in the wrongdoing and to assess the nature and extent of the willingness of their participation. In the Flick case, the tribunal found two defendants not guilty in light of the finding that they "were not desirous of employing foreign labor or prisoners of war" but "submitted to the program" under compulsion. United States v. Flick, VI Trials of War Criminals at 1197-98. Similarly, in the Krupp case, the tribunal emphasized that the defense of necessity turned on the mental state of the defendant and held that "if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct." Krupp, IX Trials of War Criminals at 1439. And, underlining the individual nature of criminal responsibility, the tribunal found one of the twelve defendants in the Krupp case not guilty of the charges based upon the deportation, exploitation and abuse of slave labor, due to the absence of individual responsibility for the crimes charged. Id. at 1449. Similarly, in the Eichmann case, the court noted that the defense of

"constraint" or "necessity" "goes to the question of the motive that urged the accused to carry out the criminal act," and found that Eichmann himself had "performed the order of extermination at all times *con amore*, that is with full zeal and devotion to the task." Attorney General of Israel v. Eichmann, 16 Piske Din 2033 (1962) (Israel Supreme Court) (Hebrew), reprinted in 36 I.L.R. 277, 318 (1968) (emphasis in original).[33]

As the preceding discussion demonstrates, the defenses of necessity and obedience to superior orders in international criminal law have focused upon the mental state and the moral responsibility of individual criminal defendants. Indeed, in Flick and Krupp, certain individuals involved with the Flick and Krupp concerns were found not guilty based on a lack of personal moral culpability, notwithstanding the corporate culpability of the companies. These criminal law defenses, focused as they are on the *mens rea* of individuals, are thus not readily transferrable to the civil law context, particularly where the defendants are corporations rather than individuals.

At bottom, these criminal law defenses are grounded upon different rationales and serve different societal purposes than the civil government contractor defense. Even were the defenses of necessity and obedience to superior orders deemed inapplicable in the criminal context as a matter of international law, therefore, such a conclusion would by no means preclude application of the government contractor defense in the civil context applicable here.[34]

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[33] The Zyklon B case, also referenced by the Court at the March 18, 2004, hearing with respect to the potential inapplicability of certain defenses to plaintiffs' international law claims, see 03/18/04 Tr. at 22-23, 25-26, did not involve a defense of necessity or following orders. It is, however, discussed below with regard to the nature of the conduct here at issue.

[34] The distinction between the criminal precedents discussed above and the civil claims at issue here is also important for another reason – the absence of prosecutorial discretion in the civil context.

3. International Law Does Not Prohibit the Applicability of a "Government Contractor Defense" When the Conduct at Issue is Not Manifestly Illegal

Finally, the Nuremberg and Eichmann cases are readily distinguishable in a more fundamental way. Those cases all involved conduct so abhorrent as to be readily identifiable as violative of international legal norms and all standards of civilized human conduct. By contrast, as discussed above, there was much debate regarding the wisdom and legality of the United States' use of chemical herbicides in Vietnam. Whatever one may conclude about the 1925 Geneva Protocol's intended applicability to chemical herbicides, it is beyond peradventure that the use of such herbicides constitutes conduct of a qualitatively different nature from the mass murder and slavery engaged in by the Nazis. See 03/18/04 Tr. at 22.

In addition to differentiating the heinous conduct engaged in by the Nazis and their accomplices from the conduct at issue here, this distinction is also legally relevant to the applicability of the government contractor defense. As the Israeli Supreme Court noted in Eichmann, the obedience to superior orders defense is generally "admissible where there was obedience to an order *not manifestly unlawful*." Eichmann, 36 I.L.R. at 314 (emphasis added). See also Rome Statute of the International Criminal Court ("Rome Statute"), art. 33(1) (superior order defense available where order "not manifestly unlawful"). Although Israeli law provided that the defense was expressly not available under

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The decision to charge a person with War Crimes – whether before a domestic court or before an international criminal tribunal – is a grave matter requiring careful exercise of prosecutorial judgment, and this judgment serves as a substantial check on the application of criminal international law and the strict application of the necessity and obedience to superior orders defenses. Cf. Sosa, 124 S. Ct. at 2763 ("[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").

the Nazi Collaborators (Punishment) Law, the Eichmann court nevertheless noted that "even if we had to decide the case on the basis of the provisions of the general criminal law [which recognizes the defense], [we] would have had to reject the defence . . . because the order for physical extermination was manifestly unlawful." Id. at 314-15.

This principle was elaborated upon by the Jerusalem District Court:

> The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying "Prohibited!". Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the order or of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt – that is the measure of "manifest unlawfulness" required to release a soldier form the duty of obedience upon him and make him criminally responsible for his acts.

Attorney General of Israel v. Eichmann, 45 Pesakim Mehoziim 3 (Jerusalem Dist. Ct. 1965), reprinted in 36 I.L.R. 18, 256 (1968), quoting Chief Military Prosecutor v. Melinki, 13 Pesakim Mehoziim 90. See also United States v. Ohlendorf (The Einsatzgruppen Case), IV Trials of War Criminals 1, 470-73, 483-86 (discussing superior orders defense; "[i]f the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order"); The Llandovery Castle Case, Supreme Court at Leipzig (1921), reprinted in 16 Am. J. Int'l L. 708, 721-22 (1922) (superior order defense inapplicable where "if such an order is universally known to everybody, including also the accused, to be without doubt whatever against the law").

The Zyklon B case is to the same effect. There, the tribunal found two of the three defendants guilty of supplying Zyklon B gas "for the extermination of allied nationals . . . well knowing that the said gas was to be so used." The Zyklon B Case (Trial of Bruno Tesch and Two Others), reported in, 1

United Nations War Crimes Commission, Law Reports of the Trials of War Criminals 93 (1947). The case focused on the accuseds' knowledge of the uses to which the gas was to be put – "the wholesale extermination of human beings." Id. at 94. The clear implication of the focus on the accuseds' knowledge is that the horrid nature of the crime was such that no defense of following orders was available. That is, in light of the "manifest illegality" of gassing millions of civilians, the only question before the tribunal was whether the defendants were aware of the uses to which the gas they provided was put.

The case at bar involves no such "manifestly illegal" conduct. To the contrary, as discussed above, no international law norm barred the use of chemical herbicides in war for purposes of defoliation or enemy crop destruction. One cannot say that use of such herbicides was "a flagrant and manifest breach of the law" or that the alleged "unlawfulness pierc[ed] the eye and revolt[ed] the heart." Rather, people of good will disagreed as to the moral and legal implications of using chemical herbicides. To the extent that international law norms governing the superior order defense inform the Court's analysis of the applicability of the government contractor defense to plaintiffs' international law claims, therefore, it is clear that international law does not preclude such a defense where, as here, the orders at issue were not manifestly illegal.

Finally in this regard, it is important to note that, to the extent that international legal norms have any role in the determination as to whether the federal common law government contractor defense is available in cases such as this, the proper inquiry is whether international law proscribes such a defense, not whether international law prescribes it. In light of the Supreme Court's ruling in Boyle recognizing the defense as a matter of federal common law, the only possible relevance of international legal norms

would be if they categorically prohibited such a defense. Absent such a prohibition, the usual federal rule should be applied for the reasons discussed above.

And international law contains no such prohibition. See generally Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied*, [hereinafter, Garraway, *Superior Orders*], Int'l Review of the Red Cross, No. 836, at 785-94 (1999), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList375/4F89CC080CE0E792C1256B66005DD767>. Although the Nuremberg Charter and Control Council Law No. 10 both provided that acting pursuant to an order of a superior does not free an individual from responsibility for a crime, those sources alone do not establish a per se rule of international law forbidding the application of a superior orders defense in all contexts. Rather, the Charter was intended to provide for the trials of the worst Nazi war criminals, whose conduct was recognized as manifestly illegal and thus not susceptible to such a defense. See id.[35] Moreover, the concept of superior orders was in fact recognized by the Nuremberg tribunals as part of the concepts of necessity and intent, discussed above, and was thus not rejected entirely. See Garraway, *Superior Orders*. In addition, as noted above, the Rome Statute expressly provides for the applicability of such a defense for war crimes. Rome Statute, art. 33. At a minimum, therefore, international law does not forbid the recognition of such a defense. Accordingly, the federal common law defense recognized by the Supreme Court should be deemed applicable to the international law claims at issue here. For this reason as well, plaintiffs' international law claims should

[35] Israeli law also recognized the unique nature of Nazi crimes. Israeli criminal law generally provided a superior order defense where the order was not manifestly illegal, but the Nazi Collaborators (Punishment) Law expressly made such a defense inapplicable to Nazi war criminals (although, like the Nuremberg Charter and the Control Council Law it provided that a superior order could be considered in mitigation of punishment). See Eichmann, 36 I.L.R. at 255-56.

be dismissed.

CONCLUSION

For the reasons discussed above, the Court should dismiss plaintiffs' international law claims.

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